Lebanite Corporation and/or R.E. Service Company *and* Western Council of Industrial Workers, Local 2554, affiliated with United Brotherhood of Carpenters & Joiners of America and Oregon Panel Products, LLC. Case 36–CA–9463-1

March 31, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On April 28, 2005, Administrative Law Judge Clifford H. Anderson issued the attached decision. Respondent R. E. Service Co. filed exceptions and a supporting brief, and Oregon Panel Products, LLC, filed exceptions.[1] The General Counsel filed an answering brief to R. E. Service Co.'s exceptions and an answering brief to Oregon Panel Products' exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order and to adopt the recommended Order as modified.[2]

The judge granted the General Counsel's motion for default judgment, which was unopposed, and found that Respondent Lebanite Corp. violated Section 8(a)(5) and (1) of the Act in several respects and ordered it, among other things, to pay backpay to 54 employees.[3] There are no exceptions to these findings. The judge further found that Respondent R. E. Service Co. was a single employer with Lebanite Corp. and was jointly and severally liable for the latter's unfair labor practices. Additionally, the judge found that Oregon Panel Products, LLC, was a *Golden State*[4] successor to Lebanite Corp. and was jointly and severally liable for Lebanite Corp.'s unfair labor practices.

[1] Oregon Panel Products, LLC, was named in the amended complaint as "Party-in-Interest Successor."

[2] As indicated below, we are modifying the recommended Order to exclude Oregon Panel Products, LLC, from its provisions.

[3] The judge found that Lebanite Corp. violated Sec. 8(a)(5) and (1) by failing to provide requested information to the Union since April 30, 2003, by repudiating the contract—including failing and/or refusing to pay vacation, holiday, and bonus pay, and a July 1, 2003 wage increase, and failing to make pension contributions and medical insurance payments—and by ceasing operations and laying off all employees in August 2003, and leasing its facility in October 2003, without notice to the Union or providing an opportunity to engage in effects bargaining. The judge ordered the Respondents to pay backpay totaling $231,440.27 to 54 employees, as provided in the compliance specification.

[4] *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973).

For the reasons stated by the judge (except as modified below in fn. 5), we agree with his finding that R. E. Service Co. was a single employer with Lebanite Corp.[5] Contrary to the judge, however, we find that Oregon Panel Products, LLC, was not a *Golden State* successor to Lebanite Corp.

Lebanite Corp. made a composite hardboard product called Lebanite at its plant in Lebanon, Oregon. Lebanite was used in furniture and as transformer board, exit drill board, and saw board in the electronics industry. In January 2000, R. E. Service, a Lodi, California corporation, that manufactures materials used in making circuit boards, purchased the Lebanite facility as an ongoing operation, holding Lebanite Corp. as a wholly-owned corporation. Mark Frater was the founder, president, chief executive officer, and 90-percent owner of R. E. Service. The Union, which had long represented the production, maintenance, and transportation employees at the facility, entered into a collective-bargaining agreement with Lebanite Corp., effective October 21, 2000, to September 30, 2004. In 2002, Robert Walker, a longtime Lebanite Corp. employee, became Lebanite Corp.'s general manager.

[5] In determining whether two entities constitute a single employer, the Board considers four factors: (1) interrelation of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership. See, e.g., *RBE Electronics of S.D.*, 320 NLRB 80 (1995). Viewing the single employer analysis more globally, the Board has also said that "[s]ingle employer status is characterized by the absence of an arm's-length relationship found among unintegrated companies." Id. In other words, the Board sometimes treats single employer status and absence of an arm's-length relationship as essentially synonymous. In some cases, however, the Board has treated absence of arm's-length relationship within the traditional four-factor test as bearing on the factor of interrelation of operations. See, e.g., *Iron Workers California District Council (Madison Industries),* 307 NLRB 405, 408 (1992) (finding no interrelation of operations where prices of purchases made between the two companies were set in arm's-length negotiations).

In his single-employer analysis, the judge treated absence of an arm's-length relationship between Lebanite Corp. and R. E. Service Co. as neither synonymous with his single-employer finding nor as an aspect of interrelation of operations within the four-factor analysis, but as an independent, fifth factor in establishing that the two companies constituted a single employer. As explained above, however, evidence probative of an absence of arm's-length relationship bears on the factor of interrelation of operations. See *Madison Industries,* supra. Thus, contrary to the judge's finding, in sec. III,C,1 of his decision, of "essentially no interrelationship of operations" between Lebanite Corp. and R. E. Service Co. "save for [R. E. Service Co.'s] use of Lebanite [hardboard] as saw and drill board," we find that evidence demonstrating that R. E. Service Co. obtained products from Lebanite Corp. in non-arm's-length transactions at reduced prices or without payment entirely is additionally probative of interrelation of operations. We need not decide, however, whether the instances of reduced price (or no price) transactions here are sufficient by themselves to show interrelation of operations because even if they are not, other factors establish a single-employer relationship.

Lebanite Corp.'s sales began falling sharply after R. E. Service's acquisition of Lebanite Corp. In response, Lebanite Corp. instituted cost-reduction measures, including laying off employees, and undertook the actions alleged in the complaint as unfair labor practices (i.e., failing to pay various items of employee compensation, failing to make pension contributions or medical insurance payments, withholding a wage increase, and refusing to provide requested information). Despite these efforts, the operation became uneconomic and, in August 2003, the plant closed.

After the Lebanite Corp. facility closed in August 2003, Walker, Clay Donne, who had been Lebanite Corp.'s distribution sales manager, and Terry Butler, who had been one of Lebanite Corp.'s customers, formed Oregon Panel Products, LLC, to resume Lebanite Corp.'s operations. On October 24, 2003, Oregon Panel entered into agreements with Lebanite Corp., its creditors, and Frater to lease from Lebanite Corp. the Lebanite operation, including the plant and equipment. The lease, although for a term of 1 year and renewable for four 1-year terms, was terminable by either party on 30 days' notice. It provided for $38,000 in monthly rental payments—$18,500 to Lebanite Corp. and $19,500 to Lebanite Corp.'s bank (which held notes on the property)—and granted Oregon Panel an option to purchase.

Oregon Panel took possession of the Lebanite Corp. site and, in November 2003, commenced hiring and initiated cleanup and inspection. Walker was Oregon Panel's general manager and Donne was its general sales manager. By December 2003, production began, and over 2 or 3 months, staffing and production increased. The original employee complement of about a 12 grew to a maximum of 52, of whom 21 were former Lebanite Corp. employees. Applicants and employees were told that Oregon Panel was not Lebanite Corp. but was an independent entity, not bound by Lebanite Corp.'s recognition of the Union or its collective-bargaining agreement.

The resumption of operations soon proved not to be economically viable. In April 2004, Oregon Panel laid off the employees and closed the plant.

The judge found that Oregon Panel was a *Golden State* successor to Lebanite Corp., and therefore liable for Lebanite Corp.'s prior unfair labor practices, because he found that there was substantial continuity between Lebanite Corp. and Oregon Panel and that, at the time of its acquisition of the Lebanite facility, Oregon Panel was aware of Lebanite Corp.'s conduct that was the basis for the unfair labor practice findings. He also found that Oregon Panel could have negotiated, or tried to negotiate, an indemnification agreement under which Lebanite Corp. would indemnify Oregon Panel for any liability for Lebanite Corp.'s unfair labor practices.

Contrary to the judge, we find that, under the circumstances of this case, the *Golden State* successorship doctrine is not appropriately applied to Oregon Panel.

In *Golden State*, the Court upheld the Board's ruling that a purchaser who had acquired an enterprise with knowledge of the seller's unremedied unfair labor practices could be held jointly and severally liable for the seller's wrongdoing. Finding that the Board had appropriately balanced the parties' legitimate interests, the Court relied, in part, on the fact that "protection for the victimized employee" was "achieved at a relatively minimal cost to the bona fide successor" because the successor's "'potential liability for remedying the unfair labor practices . . . [could] be reflected in the price he [paid] for the business, or . . . an indemnity clause in the sales contract which [would] indemnify him for liability arising from the sellers unfair labor practices.'"[6]

Mindful of the Court's rationale, the Board, subsequent to *Golden State*, has declined to find putative successors liable for their predecessors' unfair labor practices in cases where it has found that the successor's potential liability could not have been reflected in the transaction price or appropriately addressed by an indemnity clause. Thus, in *Glebe Electric*, 307 NLRB 883 (1992), the Board rejected the General Counsel's contention that Aneco Co., an electrical contractor, was a *Golden State* successor to Glebe Electric, even though Aneco had taken over a contract abandoned by Glebe and had used some of the facilities formerly used by Aneco. The Board noted that the rationale stated in *Golden State* and *Perma Vinyl Corp.,* 164 NLRB 968 (1967), for imposing liability on a purchaser for the unfair labor practices of the seller was that the purchaser could reflect its potential liability in the negotiated purchase price or through indemnification by the seller. The Board found that there was no business relationship between Glebe and Aneco and that Aneco had not acquired anything of value from Glebe. The Board thus concluded that Aneco had no opportunity to insulate itself from liability for Glebe's violations.

Subsequently, in *Hill Industries*, 320 NLRB 1116 (1996), the Board applied the rationale of *Glebe Electric* and found BTS New York (BTS) not to be a *Golden State* successor to Hill Precision (Precision). BTS took over Precision's lease of the facilities and much of the equipment formerly used by Precision. In addition, BTS purchased $3500 worth of materials from Precision and

[6] 414 U.S. at 185, quoting, in part, *Perma Vinyl Corp.*, 164 NLRB 968, 969 (1967).

entered into an agreement with Precision granting BTS the use of certain other Precision equipment in exchange for Precision's being allowed to store the equipment at the BTS facility. This agreement was terminable on 30-days' notice.

The Board found that Precision's unfair labor practice liability far exceeded the $3500 BTS paid Precision, so "[i]t would have been impossible for BTS to offset [its] potential liability . . . by negotiating over the purchase price of the materials." 320 NLRB at 1117. The Board further found that the agreement, by which BTS allowed Precision to store certain equipment in BTS's facility in return for BTS being allowed to use that equipment, failed to constitute a business relationship sufficient to establish *Golden State* successorship.[7] The Board stated:

> [B]ecause the agreement allowed either party to terminate the arrangement on a month's notice, neither BTS nor Precision could have known at the time the agreement was reached how long they could expect to benefit from it. In these circumstances, it is difficult if not impossible to know what practical benefit BTS received as a result of the agreement. Thus, the record fails to show that, in negotiating over the terms of its equipment-storage-and-use agreement with Precision, BTS could have effectively insulated itself from potential exposure to liability for Precision's unfair labor practices. Nor does it show that BTS could have secured indemnification from Precision as part of this transaction.
>
> Accordingly, we find that the overall nature of the establishment of BTS operations was ultimately not of a type under which BTS could have effectively negotiated a method of insulation from liability for Precision's unfair labor practices. [320 NLRB at 1117.]

We find that the considerations present in *Glebe Electric* and *Hill Industries* apply here.[8] We recognize that Lebanite leased its property, plant, and equipment to Oregon Panel.[9] Thus, in theory, Lebanite and Oregon Panel could have negotiated a reduction in the lease price—but only in that portion of the lease price not fixed by Lebanite Corp.'s indebtedness to the bank—to try to reflect the liability that Oregon Panel potentially would be incurring for Lebanite Corp.'s unfair labor practices. However, because the lease was terminable by either party on 30-days' notice, Oregon Panel's total payments under the lease could have amounted to far less than the potential unfair labor practice liability. For example, if the lease had been terminated after 2 months, the amount of money flowing from Oregon Panel to Lebanite would have been $37,000 ($18,500 x 2). In order to protect itself from liability, Oregon Panel would need to set off $231,440. Thus, we find that Oregon Panel could not have effectively protected itself from the potential unfair labor practice liability by negotiating a reduction in the lease price.[10]

The judge found that Oregon Panel had bargaining leverage because it was taking over Lebanite Corp.'s entire operation and, therefore, "could have negotiated or at least tried to negotiate . . . an [indemnification] agreement." He based this finding on the fact that the lease contained an indemnification clause binding on Oregon Panel and also contained Frater's personal guarantee insuring Lebanite Corp.'s compliance with certain provisions. In our view, however, the presence in the lease of an indemnification clause binding on Oregon Panel has little to do with the instant case. In order to protect itself, Oregon Panel would want an indemnification clause binding on Lebanite, whereby Lebanite would reimburse Oregon Panel if the latter were to be held liable for the unlawful conduct of the former. However, given Lebanite's precarious financial situation when it closed, it is not reasonable to believe that an indemnification clause would have protected Oregon Panel.

Finally, the judge discounted the fact that the lease was terminable on short notice because the Court, in *Golden State,* approved of the Board's refusal to "distinguish among mergers, consolidations, and purchases of as-

[7] The lease involved no monetary transaction between BTS and Precision.

[8] The judge in the instant case noted that the Board in *Hill Industries* set forth an alternative rationale, viz., that the businesses of Precision and BTS were sufficiently different to find BTS not to be a *Golden State* successor. While the Board cited this reason as an alternative basis for finding BTS not to be a *Golden State* successor, that finding did not negate the Board's principal, independent rationale based on the uncertain and potentially short duration of the agreement between Precision and BTS.

[9] By contrast, in *Hill Industries*, Precision was a lessee, and BTS took over that lease.

[10] While the dissent posits that the transaction "presumably" could have been structured to take into account Oregon Panel's potential exposure, the dissent fails to show how this could have been done. Further, contrary to the dissent's assertion, our analysis is not premised on the possibility that Lebanite Corp. might cancel the lease quickly or would have an incentive to do so. Rather, our analysis simply recognizes that, because the duration of the lease was uncertain, there could be no assurance that a reduction in the rental payment would offset the unfair labor practice liability to which Oregon Panel, if found a successor, would be exposed. Additionally, as a practical matter, it would appear that the most likely risk of early lease termination would arise from Oregon Panel's failure to successfully resurrect the business, not from a quick lease cancellation by Lebanite Corp. Thus, the dissent's assertion that we never explain why Lebanite would have an incentive to quickly cancel the lease falls wide of the mark.

sets."[11] However, our decision here does not turn on such distinctions. It turns on the practical reality that Oregon Panel could not have protected itself in the transaction with Lebanite, irrespective of the form that transaction assumed.[12]

Our colleague asserts that it is "not unfair" to impose liability on Oregon Panel, and she then cites equities which, in her view, favor the employees. However, she neglects to mention the equities in favor of Oregon Panel, viz., the fact that it is entirely innocent of any unlawful conduct.[13] In order to *balance* the equities of the employees and those of the innocent purchaser, the Supreme Court and the Board are willing to impose liability on the innocent purchaser provided that the purchaser has the opportunity to protect itself in a meaningful way. We agree with our colleague that if the purchaser has that opportunity, and fails to take advantage of it, the purchaser cannot be heard to complain. However, our point in this case is that, given the amounts involved, there was no meaningful opportunity for Oregon Panel to protect itself.

Our colleague seemingly recognizes this, but says that it is not "inherently impossible" that Oregon Panel could have protected itself by using the acquired assets to gen-

[11] *Golden State Bottling Co. v. NLRB*, 414 U.S. 182 fn. 5 (1973).

[12] Member Schaumber finds additional support for his conclusion that Oregon Panel is not a *Golden State* successor to Lebanite Corp. in the Ninth Circuit's successorship decision in *Steinbach v. Hubbard*, 51 F.3d 843 (9th Cir. 1995), a Fair Labor Standards Act (FLSA) case. In *Steinbach* as in this case, the predecessor company was failing; and Care Ambulance, the successor sought to be held liable under *Golden State*, had leased the predecessor's assets. In declining to impose *Golden State* liability on Care Ambulance, the court of appeals emphasized, inter alia, the public's "substantial interest in the free transfer of capital and the reorganization of unprofitable businesses," 51 F.3d at 846 (internal quotations omitted), and underlined the importance of promoting "a trial run" in which "an acquirer could discover a potentially viable company," id. at 847. The court further noted that such a trial run could also benefit the predecessor's employees: "Permitting shopping for dying companies increases the chances such companies may find buyers, thus also increasing the chances buyers will be found who perhaps may satisfy existing . . . liabilities." Id. Member Schaumber finds these considerations plainly apply here, further supporting his *Golden State* successorship finding.

Though Member Schaumber agrees with the Chairman that he would impose *Golden State* successorship where the successor has notice of potential liability and a meaningful opportunity to protect itself financially from that liability, so did the Ninth Circuit in *Steinbach*. Like the instant case, *Steinbach* involved a successor that leased the predecessor's assets under circumstances precluding the successor from having a meaningful opportunity to protect itself from potential liability. See 51 F.3d at 847 (finding that successor had "little room for negotiation of protection"). The *Steinbach* court did not rely on the policy concerns noted above in a vacuum. Rather, it cited those concerns as part of the "equitable considerations inform[ing its] decision"—along with, it should be noted, "the policies underlying the FLSA," which "can best be effectuated by seeing to it that violations are remedied in as many cases as possible." Id. at 846. Nowhere did the court suggest that it would decline to impose *Golden State* successorship to protect the free transfer of capital even where the successor *does* have room to negotiate protection for itself. Indeed, the court indicated to the contrary by stating: "[W]e do not intend to shield companies who were merely lacking in foresight." Id. at 847.

Member Schaumber also disagrees with Member Liebman's assertion "that the rationale of *Steinbach v. Hubbard* . . . does not apply here." As explained above, in Member Schaumber's view, the rationale of *Steinbach* is in all essential respects the same as the rationale upon which the Chairman and Member Schaumber rely in this case. Similarly Member Schaumber differs with Member Liebman's characterization of a law student case note as an "incisive criticism" of *Steinbach*. See Andrew P. Pickering, *Steinbach v. Hubbard: Somebody Call an Ambulance! The Fair Labor Standards Act and the Successor Liability Doctrine Have Been Seriously Injured!*, 1996 B.Y.U. L. Rev. 689 (1996). That student note actually mischaracterizes the Ninth Circuit's decision. For example, the note asserts that the court found the first prong of the *Golden State* analysis—bona fide successorship—was not met "because a permanent transfer of assets . . . never took place." Id. at 694. Contrast the court's own, more nuanced rationale: "[T]he interests of the affected parties, as well as the policies underlying FLSA and supporting free transfer of capital, lead us to conclude Care does not qualify as a bona fide successor." 51 F.3d at 847. The court did place emphasis on the fact that the successor had leased its predecessor's assets, but it did not find the form of the transaction controlling. To the contrary, the court expressly stated that "[f]aced with a longer-term commercial lease, we might conceivably have reached a different conclusion." Id. at 848 fn. 1. The author of the note also criticized the Ninth Circuit for allowing its application of the *Golden State* "notice" prong to be informed by the reality that the successor had little room to negotiate protection from potential liability. "There are no special policy concerns in the test" for notice, the author categorically asserted. 1996 B.Y.U.L. Rev. at 697. This criticism is misguided at best, ignoring as it does that both the Supreme Court in *Golden State* and the Board in *Perma Vinyl* expressly linked the notice requirement to the successor's consequent opportunity to strike a deal that will offset potential liability. Where that opportunity is absent notwithstanding notice of potential liability, as in this case and *Steinbach*, adopting the note's "notice" fundamentalism will only induce prospective successors in like straits to walk away from the deal altogether—a result that not only does not help the predecessor's employees be made whole for its unfair labor practices, but that also injures both those employees (by depriving them of an employment opportunity) and the public interest (by depriving it of an opportunity to have the predecessor's failing business resuscitated). Thus, Member Schaumber finds Member Liebman's reliance on Mr. Pickering's note misplaced.

Chairman Battista relies upon *Steinbach* to the extent that it teaches that a successor who cannot protect itself from liability for its predecessor's unlawful conduct cannot be made liable for that conduct. He does not rely upon *Steinbach* to the extent that it may teach that, quite apart from the above consideration, a successor should be protected because of such general considerations as the value of "free flow of capital" and the value of reorganizing unprofitable business.

[13] Our dissenting colleague asserts that Oregon Panel's innocence has already been taken into account by imposing a notice requirement. Holding Oregon Panel liable for Lebanite's unfair labor practices without a notice requirement—i.e., if Oregon Panel lacked notice of Lebanite's unfair labor practices—would surely be unfair. However, in weighing whether to impose liability on Oregon Panel for Lebanite's misconduct, we do not agree that a mere notice requirement alone grants sufficient recognition to the fact that Oregon Panel itself is innocent of any unlawful conduct.

erate sufficient income to satisfy the predecessor's liability. However, that can be said about virtually every transaction. Presumably, every purchaser of a business hopes to generate income, and that income *could* be used to satisfy a seller's liabilities. But, as discussed above, that is not the test. The test is whether there was an opportunity to structure the *transaction itself* in a way that would allow the employees to be made whole *and* would also protect the purchaser.[14]

Our colleague then suggests that the parties would purposefully modify their transaction for the opposite purpose, i.e., to avoid successor liability. The simple answer is that there is no allegation or evidence of such a motive.

Finally, our colleague says that it should make no difference that a predecessor is financially distressed. However, as discussed above, an indemnity clause is one way in which a purchaser can protect itself. It would seem apparent that an indemnity clause is worthless if the predecessor has no assets to pledge.[15]

Contrary to the dissent, we find that this case shares key similarities with *Hill Industries.* First, in both cases, the predecessor's unfair labor practice liability is substantially greater than the amount of the putative successor's purchase or rental payment to the predecessor. Second, in both cases, the predecessor had an agreement with the putative successor that was terminable on a month's notice.

On these facts, the Board in *Hill Industries* found that the alleged successor, BTS, could not have offset its potential liability for the unfair labor practices of the predecessor, Precision, by negotiating a price reduction for BTS's purchase from Precision because the unfair labor practice liability was so much greater than the purchase price. Additionally, the Board found that, as neither party could have known how long they would have the benefit of their equipment-use agreement, BTS, in negotiating the agreement, could not have insulated itself from exposure to Precision's unfair labor practice liability or secured indemnification for such liability. Thus, the Board held BTS not to be a *Golden State* successor.

[14] Our colleague also posits that business conditions might have improved and Oregon Panel's lease agreement with Lebanite might have been extended indefinitely, but that, had those events occurred, the employees nevertheless would have had no practical way to pursue their backpay claims under our decision. The hypothetical facts suggested by our colleague, however, are not presented before us, and we need express no view here concerning the proper outcome given such facts.

[15] Our dissenting colleague's assertion that Oregon Panel could have bargained for indemnification in the form of title to a portion of Lebanite's assets—despite the fact that Lebanite' bank had a security interest in those assets—is entirely speculative and highly implausible.

As indicated above, the same key considerations in *Hill Industries* are present here. Lebanite Corp.'s unfair labor practice liability, which exceeds $231,000, is much greater than—and thus could not reasonably be offset by—Oregon Panel's $18,500 rental payment to it. Additionally, Oregon Panel's lease agreement with Lebanite Corp. was terminable by either party on 30-days' notice, so neither party could have known how long the lease agreement would be in effect. On these similar facts, we reach the same conclusion that the Board did in *Hill Industries*. Oregon Panel "could not have effectively negotiated a method of insulation from liability for [Lebanite Corp.'s] unfair labor practices,"[16] and therefore should not be found a *Golden State* successor to Lebanite Corp.[17]

Accordingly, for the reasons stated above, we reverse the judge and find Oregon Panel not to be a *Golden State* successor to Lebanite Corp.[18]

[16] 320 NLRB at 1117.

[17] We disagree with the dissent's contention that, in reaching this conclusion, we have improperly focused on the specific terms of the transaction between Lebanite Corp. and Oregon Panel. In basing our analysis on these terms, we are doing no more than what the Board did in *Hill Industries*, where its decision turned on the specifics of the transaction between the parties, as detailed above.

We find markedly different from the present case two cases cited by the dissent where the Board rejected contentions that alleged *Golden State* successors could not have adjusted their transactions with predecessors to compensate for unfair labor practice liability. We are not holding here that a sale and purchase is a prerequisite to a finding of successorship. Thus, the Board's rejection of such an argument in *Ponn Distributing, Inc*., 232 NLRB 312, 314 (1977), has no bearing on our decision. Likewise, we are not finding that Oregon Panel could not have negotiated a method of insulation from Lebanite Corp.'s unfair labor practice liability on the basis that Lebanite Corp. refused to negotiate about this matter. Thus, the Board's rejection of such an argument in *S. Bent & Bros*., 336 NLRB 788, 792 (2001), is equally of no moment here.

[18] In finding that Oregon Panel had notice of its potential liability, the judge relied on *S. Bent & Bros.*, 336 NLRB 788 (2001). In that decision, the Board held that so long as a successor was aware of conduct by its predecessor ultimately found unlawful by the Board, the notice element of the *Golden State* analysis is satisfied regardless of whether the successor was aware that charges had been filed or that the Board had issued a complaint.

Member Schaumber disagrees with *S. Bent*'s categorical notice rule because it fails to take into account the circumstances of the particular case. He acknowledges that if the nature of a predecessor's unfair labor practice conduct makes potential liability obvious to a successor, it may well be appropriate to hold the notice element satisfied where an alleged *Golden State* successor is aware of that conduct without more. On the other hand, however, it is sometimes far from obvious, before the fact, that conduct ultimately alleged and found to have violated the Act was, in fact, likely to result in unfair labor practice liability. For example, with the best of intentions, employers on the threshold of a union election sometimes withhold a planned wage increase out of a reasonable concern with being perceived as trying to buy employees' votes. A successor not steeped in Board law would be unlikely to suspect anything amiss in such a decision. Nevertheless, to withhold a

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and orders that the Respondent, Lebanite Corporation, Lebanon, Oregon, and R. E. Service Company, Lodi, California, their officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER LIEBMAN, dissenting in part.

After unlawfully repudiating its collective-bargaining agreement with the Union (and failing to make pension contributions and medical insurance payments, among other violations), Lebanite Corporation closed its operation—only to lease its property, plant, and equipment (with an option to purchase) to Oregon Panel Products, an entity formed by certain Lebanite managers, which then proceeded to hire a substantial number of former Lebanite employees. The question here is Oregon Panel's liability, as a successor employer under the *Golden State* doctrine,[1] for Lebanite's unfair labor practices.

In contrast to the majority, I would find that Oregon Panel *did* have a meaningful opportunity to insulate itself from liability, as measured by the Board's decisions in this area. Oregon Panel had notice of Lebanite's conduct, and given the nature of its relationship with Lebanite, imposing liability is not unfair. The majority's approach neglects the Board's traditional "emphasis on protection for the victimized employee, who may be 'without meaningful remedy when title to the employing business operation changes hands.'" *S. Bent & Bros.*, 336 NLRB 788, 791 (2001), quoting *Golden State Bottling Co.*, supra, 414 U.S. at 181.

I.

The principles that govern this case are well established. In *Golden State Bottling*, the Supreme Court endorsed the approach to successor liability articulated in the Board's *Perma Vinyl* decision. There, the Board held that:

> [O]ne who acquires and operates a business of an employer found guilty of unfair labor practices in basically unchanged form under circumstances which charge him with notice of unfair labor practice charges against his predecessor should be held responsible for remedying his predecessor's unlawful conduct.

Perma Vinyl Corp., 164 NLRB 968, 969 (1967), enfd. 398 F.2d 544 (5th Cir. 1968).

This test, the Supreme Court held, reflected an appropriate "balance between the conflicting legitimate interests of the bona fide successor, the public, and the affected employee." 414 U.S. at 181. As the Court explained:

> Avoidance of labor strife, prevention of a deterrent effect on the exercise of rights guaranteed employees by §7 of the Act . . ., and protection for the victimized employee . . . are achieved at a relatively minimal cost to the bona fide successor. Since the successor must have notice before liability can be imposed, "his potential liability for remedying the unfair labor practice is a matter which can be reflected in the price he pays for the business, or he may secure an indemnity clause in the sales contract which will indemnify him for liability arising from the sellers' unfair labor practices."

Id. at 185, quoting *Perma Vinyl*, supra, 164 NLRB at 969.[2]

Here, as the judge correctly found, Oregon Panel operated Lebanite's business in basically unchanged form. And Oregon Panel is properly charged with notice of Lebanite's unfair labor practices—despite my colleagues' separate, apparent misgivings about controlling law. Robert Walker, Lebanite's general manager, was aware of Lebanite's conduct and then became a principal of Oregon Panel. "[I]n determining whether a successor had notice of its potential liability, the Board does not consider whether the successor has seen the particular charges or complaints, but rather, whether the successor was aware of conduct that the Board ultimately found

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raise because of a pending union election is an unfair labor practice; and under the categorical rule of *S. Bent*, a successor aware only that the raise had been withheld, without knowledge that the withholding had been alleged as unlawful, would find itself, unfairly, well down the path to being held liable as a *Golden State* successor. Thus, Member Schaumber disagrees with the per se notice rule of *S. Bent*, and favors instead a case-by-case approach. He need not decide here, however, whether, applying that approach, he would find Oregon Panel did or did not have notice of its potential liability because the considerations set forth above in the instant decision would be independently dispositive in any event of the *Golden State* successorship issue.

Inasmuch as the Board is reversing, on other grounds, the judge's finding that Oregon Panel was a *Golden State* successor to Lebanite Corp., Chairman Battista finds it unnecessary to comment on the judge's reliance on *S. Bent & Bros*., supra, in reaching his finding.

[1] *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973).

[2] The *Golden State Bottling* Court also observed that "there is no underlying congressional policy here militating *against* the imposition of liability." 414 U.S. at 185 (emphasis added).

Accordingly, I agree with Chairman Battista that the rationale of *Steinbach v. Hubbard*, 51 F.3d 843 (9th Cir. 1995)—a decision under the Fair Labor Standards Act that emphasizes a public interest in the "free transfer of capital and the reorganization of unprofitable businesses"—does not apply here. For an incisive criticism of *Steinbach*, see Andrew P. Pickering, *Steinbach v. Hubbard: Somebody Call an Ambulance! The Fair Labor Standards Act and the Successor Liability Doctrine Have Been Seriously Injured!*, 1996 B.Y.U. L. Rev. 689 (1996).

unlawful." *S. Bent & Bros.*, supra, 336 NLRB at 790 (collecting cases).

II.

Based on the continuity of the enterprise, coupled with Oregon Panel's notice of the underlying unfair labor practices, imposing successor liability in this case would seem to be a straightforward matter. The majority, however, declines to do so, on the basis that Oregon Panel "could not have effectively protected itself from the potential unfair labor practice liability by negotiating a reduction in the lease price." In support of this rationale, the majority cites two Board decisions, *Glebe Electric*, 307 NLRB 883 (1992), and *Hill Industries*, 320 NLRB 1116 (1996). But the majority's approach is flawed, and the cases it cites are distinguishable.

A.

To begin, if a successor is on *notice* of potential unfair labor practice liability, then the Board must, at the very least, presume that the successor had the *opportunity* to avoid or mitigate its liability. It is surely the successor's evidentiary burden to rebut this presumption, just as it is the successor's burden to prove lack of notice. See *Bellingham Frozen Foods,* 237 NLRB 1450, 1466 fn. 26 (1978), enfd. denied on other grounds 626 F.2d 674, 681 (9th Cir. 1980). See also *S. Bent & Bros.*, supra, 336 NLRB at 790 (successor's burden to prove lack of notice).

The burden, in turn, is a high one. The *Golden State Bottling* test obviously does not require that the successor actually *succeed* in winning indemnification or a reduced price from the predecessor. If the successor, despite notice, fails to insulate itself, but nevertheless proceeds with the transaction, it does so at its own risk, and there is no unfairness in imposing liability. See *Bellingham Frozen Foods*, supra, 237 NLRB at 1466 fn. 26 ("[I]t is unlikely that a successor with prior knowledge of the unfair labor practice liability could invoke its own failure to so adjust the purchase price as a means of evading liability for remedying a predecessor's unlawful conduct").

The majority acknowledges that "Lebanite leased its property, plant, and equipment to Oregon Panel" and "[t]hus, in theory, Lebanite and Oregon Panel could have negotiated a reduction in the lease price . . . to try to reflect the liability that Oregon Panel potentially would be incurring for Lebanite's unfair labor practices." This finding, it seems to me, should be sufficient to establish successor liability.

The majority, however, focuses on the terms of the lease, observing that "because the lease was terminable by either party on 30-days' notice, Oregon Panel's total payments under the lease could have amounted to far less than the potential unfair labor practice liability." According to the majority, "[i]n order to protect itself from liability, Oregon Panel would need to set-off $231,440," but its lease payments to Lebanite might have amounted to no more than $37,000 (two monthly payments of $18,500), if Lebanite had cancelled the lease.

The majority's reasoning is hard to follow. Oregon Panel's lease payments gave it the right to use Lebanite's property, plant, and equipment, as well as the option to purchase those assets. Nothing about the transaction made it inherently impossible for Oregon Panel to use those productive assets to generate sufficient income to discharge Lebanite's liability—and thus the transaction presumably could have been structured to take into account Oregon Panel's potential exposure. More fundamentally, the majority errs in taking the terms of the transaction between Lebanite and Oregon Panel as a given and then concluding that, within that framework, there was no room for a price reduction or an equivalent means of addressing Oregon Panel's legal exposure. This approach wrongly invites parties to structure their transactions to avoid successor liability. It simply assumes—rather than requiring Oregon Panel to prove—that it was somehow impossible for it to acquire the use of Lebanite's assets on terms that accounted for the potential unfair labor practice liability.[3]

The proper focus, rather, is on the *nature* of the relationship between the predecessor and the successor, not on the specific terms of the transaction between them.[4]

[3] The majority's analysis seems premised on the possibility that Lebanite might cancel the lease quickly, leaving Oregon Panel with successor liability but no means to satisfy it. But the majority never explains why Lebanite would have an incentive to do so, if Oregon Panel was operating the plant productively and, by its lease payments, reducing Lebanite's indebtedness. Oregon Panel also had acquired a right to purchase, which the majority fails to factor into its analysis.

Moreover, the majority's conclusion that Oregon Panel "could not have protected itself" is incorrect even apart from the lease payments. Although Lebanite leased all of its assets to Oregon Panel, it retained those assets' ultimate *sale* value. Thus, Oregon Panel could have bargained for indemnification—i.e., for the right of title to at least some of those assets in the event of *Golden State liability*. Although Lebanite's bank had a security interest in the same assets, it might well have agreed to such an arrangement, because it clearly preferred the lease agreement to the alternative of Lebanite's going into bankruptcy. However, Oregon Panel apparently did not even try to bargain for such protection.

[4] See, e.g., *Ponn Distributing, Inc.*, 232 NLRB 312, 314–315 (1977) (imposing liability on successor that foreclosed on security interest in predecessor's assets, rejecting argument that absence of sale-and-purchase precluded successor from adjusting purchase price to compensate for potential liability). Cf. *S. Bent & Bros.*, supra, 336 NLRB at 792 (rejecting argument that successor, who purchased assets of predecessor in secured private-party sale through banks, lacked opportunity

Here, given the nature of the transaction—Oregon Panel acquired the use of Lebanite's entire operation—there is no inequity in imposing successor liability. In such circumstances, employees would reasonably regard Oregon Panel as substituting itself for Lebanite and as benefiting from Lebanite's unfair labor practices; thus, labor strife might predictably follow Oregon Panel's refusal to discharge Lebanite's legal obligations to employees.[5] Holding Oregon Panel liable, of course, furthers the goal of making victimized employees whole.

The majority observes that "given Lebanite's precarious financial situation when it closed, it is not reasonable to believe that an indemnification clause would have protected Oregon Panel." But in imposing successor liability, it should make no difference that a financially distressed predecessor is unable, as a practical matter, to indemnify the successor. As *Golden State Bottling* makes clear, it is precisely those situations—in which *employees* also have no meaningful recourse against the predecessor—where the availability of successor liability is most important to promote the policies of the National Labor Relations Act.[6]

B.

The decisions on which the majority relies, *Glebe Electric* and *Hill Industries*, do not support the result reached here.

As the majority acknowledges, in *Glebe Electric*, the Board refused to impose successor liability because it found a "total absence of any business relationship between Glebe [the predecessor] and Aneco [the putative successor]." 307 NLRB at 885. Aneco simply took over Glebe's contract to do electrical work for another party, Centex, and never dealt with Glebe at all. In the majority's words here, "Aneco had not acquired anything of value from Glebe." This case is obviously different. Oregon Panel and Lebanite did have a business relationship, and Oregon Panel did acquire something of value from Lebanite: the right to use (and to buy) its property, plant, and equipment.

Hill Industries is distinguishable as well. There, the only assets the putative successor (BTS) acquired from the predecessor (Precision) were $3500 worth of materials, while the unfair labor practice liability "greatly exceed[ed] $53,000." 320 NLRB at 1116. Precision also agreed to allow BTS to use certain equipment, in return for permitting Precision to store it on the premises, but the record did not show that BTS actually used the equipment or that BTS derived any "practical benefit" from the agreement. Id. at 1116–1117. The Board thus concluded that:

> [T]he *overall nature of the establishment of BTS operations* was ultimately not of a type under which BTS could effectively have negotiated a method of insulation from liability from Precision's unfair labor practices.

Id. at 1117 (emphasis added). The Board went on to cite "another equally important consideration" that militated against a finding of successor liability: the "significant difference between the corporate missions of the two entities." Id. Based on these two considerations, the Board refused to hold BTS liable.

Even accepting the majority's debatable view that the two considerations cited by the Board were independent grounds for rejecting successor liability,[7] *Hill Industries* is easily distinguished from this case. In contrast to the equipment-storage-and-use agreement in *Hill Industries*, the lease agreement here certainly conveyed a substantial "practical benefit" on Oregon Panel: the use of Lebanite's entire productive operation. The "overall nature of the establishment of [Oregon Panel's] operations"—in the words of *Hill Industries*—was indeed "of a *type* under which [Oregon Panel] could have effectively negotiated a method of insulation from liability." 320 NLRB at 1117 (emphasis added).[8]

In short, the majority cites no case comparable to this one in which the Board has refused to impose successor liability.

to negotiate insulation from liability, despite testimony that banks were unwilling to negotiate).

[5] See *Perma Vinyl*, supra, 164 NLRB at 969 (explaining imposition of successor liability in terms of employees' perspective, describing successor as "beneficiary of unremedied unfair labor practices," and observing that successor "is generally in the best position to remedy . . . unfair labor practices most effectively").

[6] The majority emphasizes the purported "equities in favor of Oregon Panel, viz. the fact that it is entirely innocent of any unlawful conduct." Under established law, however, Oregon Panel's innocence has already been taken into account, by imposing a notice requirement. The majority's refusal to find Oregon Panel liable is all the more prejudicial to the wronged employees in view of the relationship between Lebanite and Oregon Panel. Had Lebanite gone into bankruptcy, as it clearly would have done in the absence of the lease agreement for all of Lebanite's assets, the Board could at least have pursued the employees' backpay claims in the bankruptcy proceeding. The lease agreement with Oregon Panel, however, might have been *extended* indefinitely had business conditions improved. In that event, under the majority's decision, there would have been no practical way to pursue the backpay claims.

[7] The better reading of the decision is that the *Hill Industries* Board treated the two considerations as cumulatively supporting its holding. Nothing in the language of the decision indicates otherwise, much less supports the majority's labeling of the first consideration as the "principal . . . rationale."

[8] Moreover, there was no "significant difference between the corporate missions" of Lebanite and Oregon Panel, the second consideration relied upon in *Hill Industries*.

III.

The majority's narrow focus predictably leads to the wrong result. Concentrating entirely on Oregon Panel's interests, the majority gives no weight at all to the other interests implicated here: the public interest in avoiding labor strife and the interest of victimized employees in being made whole. In analyzing Oregon Panel's situation, the majority fails to appreciate the nature of the transaction with Lebanite, which did give Oregon Panel a meaningful opportunity to avoid or mitigate liability. Here, Lebanite's former employees should not be left holding the bag. Accordingly, I dissent.

Richard C. Fiol, Esq., for the General Counsel.
Richard N. VanCleave, Esq. (Barran Liebmann), of Portland, Oregon, for Lebanite Corporation and R. E. Service Company.
John L. Barlow, Esq. (Barnhisel, Willis, Barlow & Stephens), of Corvallis, Oregon, for Oregon Panel Products.
Harlan Bernstein, Esq. (Jolles & Bernstein), of Portland, Oregon, for the Charging Party.

DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge. I heard the above-captioned case in trial on November 2 and 3, 2004, and January 26, 2005, pursuant to an order consolidating proceedings, amended complaint, compliance specification and notice of hearing issued by the Regional Director for Region 19 of the National Labor Relations Board (the Board) on May 28, 2004. Posthearing briefs were due on March 23, 2005.

The amended complaint and compliance specification is based on a charge filed by the Western Council of Industrial Workers, Local 2554, affiliated with the United Brotherhood of Carpenters & Joiners of America (the Charging Party or the Union) against Lebanite Corporation (Lebanite) and/or R. E. Service Company (RES), and Oregon Panel Products, LLC (OPP) on October 10, 2003, amended on November 7, 2003, and docketed as Case 36–CA–9463–1.

Respecting Lebanite: The complaint, as amended at the hearing, alleges, inter alia, that Lebanite had a collective-bargaining agreement with the Union respecting unit employees at its Lebanon, Oregon facility which extended by its terms from October 21, 2000, to September 30, 2004. The complaint further alleges that Lebanite on and after April 28, 2003, failed and refused to provide the Union with requested information relevant to fulfilling its function as representative of employees. It also alleges Lebanite, on and after about July 1, 2003, repudiated the contract refusing to comply with its terms and, on or about August 1, 2003, ceased operations and laid off all its employees—all without prior notice to the Union or affording it an opportunity to bargain respecting the effects of its actions. Finally the complaint alleges with respect to Lebanite, that the conduct described above violates Section 8(a)(5) and (1) of the National Labor Relations Act (the Act). In the compliance specification the Regional Director alleges a specific liquidated remedy for unit employees arising from the unfair labor practices alleged.

Lebanite did not file an answer contesting either the complaint or the compliance specification. At the opening of the hearing, I granted the General Counsel's unopposed[1] motion for default judgment against Lebanite respecting both the unfair labor practice allegations and the compliance specification. Neither RES nor OPP in their answers denied the allegations of the compliance specification, save that each denied those elements of the complaint which asserted grounds for extending liability for the remedial requirements of the specification to them. At the opening of the hearing, I granted the General Counsel's unopposed motions for limited, partial default judgments against both RES and OPP respecting the compliance specification elements of the Regional Director's May 28, 2004 order consolidating proceedings, amended complaint, compliance specification, and notice of hearing.

Thus, as a result of the pleadings, stipulations of counsel at the hearing, and the positions taken by the parties respecting the three trial motions of the General Counsel described above, there was no dispute respecting: (1) all elements of the complaint and compliance specification concerning Lebanite, and (2) respecting RES and OPP there was no dispute regarding the complaint or the compliance specification's terms, save as to the responsibility of RES and OPP, if any, for the unfair labor practices and for the compliance specification remedy for the violations, as set forth in greater particularity below.

Respecting RES: The amended complaint alleges, and RES denies, that Lebanite and RES at all material times were a single-integrated business and/or a single employer and, in consequence, that RES is jointly and severally liable with Lebanite for the unfair labor practices, the remedy set forth in the compliance specification and any other remedy directed to Lebanite.

Respecting OPP: The amended complaint alleges and OPP denies, that OPP has continued as the employing entity with notice of Lebanite's potential liability to remedy its unfair labor practices and is a successor to Lebanite and jointly and severally liable for the remedy directed against Lebanite.

FINDINGS OF FACT

Upon the entire record herein, including helpful briefs from RES, OPP, and the General Counsel, I make the following findings of fact.[2]

I. JURISDICTION[3]

Lebanite is a State of Oregon corporation which had an office and a place of business in Lebanon, Oregon, until October

[1] Counsel VanCleave, appearing for both Lebanite and RES, made it clear that while Lebanite was not opposing the motion, RES was denying and defending against the joint employer/single employer, joint and several liability allegations of the complaint.

[2] As a result of the pleadings and the positions and stipulations of counsel at the trial, there were few disputes of fact regarding collateral matters. Where not otherwise noted, the findings herein are based on the pleadings, the stipulations of counsel, or unchallenged credible evidence.

[3] The jurisdictional facts were established by the pleadings or the stipulations and admissions of counsel at trial.

2003 where, until on or about August 2003, it was engaged in the business of manufacturing laminate wood products. RES is a California corporation with an office and place of business in Lodi, California, where it is engaged in the manufacture and distribution of materials used in making printed circuit boards. OPP is a State of Oregon corporation which at relevant times had an office and place of business in Lebanon, Oregon, where it was engaged in the business of manufacturing laminate wood products.

Lebanite, during the period July 1, 2002, to July 1, 2003, in the course and conduct of its business operations, manufactured and shipped to sources outside the State of Oregon, goods and materials valued in excess of $50,000. RES during the 12-month period prior to the issuance of the complaint, a representative period, in the course and conduct of its business operations, manufactured and shipped goods or provided services from its California facilities to customers outside the State, or sold and shipped goods or provided services to customers within California which customers were themselves engaged in interstate commerce by other than indirect means, of a total value of $50,000. OPP, in the 12-month period following October 24, 2003, in the course and conduct of its business operations, manufactured and shipped to sources outside the State of Oregon, goods and materials valued in excess of $50,000.

Based on the above, there is no dispute and I find that Lebanite, RES and OPP have been, and each of them, at all times material, has been, employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The record establishes, there is no dispute, and I find the Union is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Lebanite Corporation and R. E. Service Corporation

Lebanite, the product, is a longstanding, patented trade name for an engineered composite hardboard panel developed and manufactured at a facility in Lebanon, Oregon (the facility). While Lebanite was made in different thicknesses and densities, it comprised the essentially exclusive product of the facility. Through the facility's many years of operations, the facility and the associated rights to manufacture and use the trade name Lebanite have been owned and operated by various forest product organizations including Champion International, U.S. Plywood, and Georgia-Pacific. In January 2000, R. E. Service, a Subchapter S, California corporation with offices and a manufacturing facility in Lodi, California, purchased the facility as an ongoing operation from Georgia Pacific holding it under a newly formed corporation, Lebanite Corporation, a Subchapter S, Oregon corporation wholly owned by R. E. Service. Mark Frater was and has at all times material been the founder, president, chief executive officer, and a 90-percent owner of RES.

The Union had long represented employees at the facility and Lebanite recognized the Union as the exclusive representative of its employees in the following unit (the unit) appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full, regular part-time and temporary production employees, maintenance employees and transportation employees employed by Lebanite Corporation at its Lebanon, Oregon facility; excluding all professional employees, temporary construction employees, independent contractors and their employees, guards and supervisors as defined in the Act.

Lebanite and the Union entered into a collective-bargaining agreement, effective by its terms from October 21, 2000, to September 30, 2004. In 2001, the unit comprised approximately 200 employees, but thereafter was greatly reduced as discussed below.

Lebanite's general manager was Robert (Skip) Walker, a longtime employee who assumed the general manager position in 2002. He testified he initially reported to Alex Watt, Lebanite's chief operating officer and accountant who maintained offices both at the RES facility in Lodi, California, and at the Lebanon facility. Upon Watt's departure, Walker testified, Watt's duties were assumed by Mark Frater. Walker as Lebanite's general manager closely consulted with Watt and thereafter with Frater on production decisions as well as all decisions involving expenditures of funds. Frater worked at his RES offices in Lodi, California, but was in regular telephonic contact with Walker respecting Lebanite's operations and prospects. Walker testified that from the beginning of RES' ownership of Lebanite in 2000, all its product prices were set by Frater. RES' general manager, Jeff Mason, also regularly participated in twice monthly telephonic conference calls in which sales and miscellaneous management topics would be discussed and decisions taken.

The product "Lebanite," Lebanite Corporation's sole product, had primary application as a hardboard used as a component material in furniture and doors becoming part of the final product. It was also used as transformer board, exit drill board and saw board in the electronics industry. In the latter uses, the product was used in the manufacturer of electronics and did not become part of the final product.[4] During the period 2000 into 2001, Lebanite's production of exit drill board represented between 30 and 50 percent of the facilities output.

At relevant times, RES was solely engaged in manufacturing in the printed circuit board business providing drill board type laminates and copper and aluminum foils, tooling plates and various accessories related to manufacturing circuit boards, and generally related to a laminating process done by RES. During the period 2000 into 2001, RES purchased 25 to 30 percent of Lebanite's exit drill board output. Walker testified that initially, RES paid the same price for the products it purchased from Lebanite's as its other buyers. Later, however, he was told by Watt that Watt had reduced RES' prices to eliminate the approximately 40-percent markup that Lebanite charged as its gross profit over its cost. Walker testified that prices did not

[4] Thus, for example, exit drill board is used as backing for circuit boards when holes were drilled in them preventing harm to the circuit board during the drilling process. Saw board served the same function during the process of sawing or cutting circuit boards.

change upon Watt's departure, so Walker believed the discount remained in place for RES purchases.

Clay David Donne, the Lebanite distribution sales manager from October 2001 to its closure, testified that during his tenure customers paid about $153 per 1000-square feet for Lebanite L-30, a popular product type, but that RES throughout his tenure paid "$50 to $60 per 1000," a price of between a third and 40 percent of the price paid by others. His NLRB-prepared investigatory affidavit stated that he did not know the prices paid by RES, but at trial Donne asserted that he had misunderstood the Board agent's question and the affidavit was incorrect, because the RES price was in the Lebanite computer system and he was familiar with it.

Frater testified that RES purchased its Lebanite materials from Lebanite Corporation paying essentially the same price for like volumes that other customers paid. In late 2001 and into 2002 it became uneconomical for RES to use Lebanite as drill board and it no longer purchased it. RES did continue to use Lebanite blemished and off specification output as saw board in 2002 and 2003, but Frater testified: "[M]ost of the saw board we got from Lebanite, we just took," i.e., the product was neither invoiced by Lebanite nor paid for by RES.

Various market factors combined to reduce Lebanite's sales volume. Frater testified the national collapse of what has come to be known as the ".com boom" seriously reduced the manufacture and sale of electronic equipment, the manufacture of which was a significant basis for sales of Lebanite. Further, other electronic manufacturers who had been purchasing Lebanite earlier became reluctant to do so when RES, a competitor, acquired Lebanite. Finally, other similar but cheaper hard board products produced abroad became increasingly competitive in all market areas in which Lebanite was used and competitors' sales further reduced Lebanite's sales volume and market share. In the aggregate these factors very seriously reduced Lebanite's sales volume beginning soon after RES' acquisition, a sales deterioration that continued and worsened over time. In response Lebanite instituted various cost reduction measures. The unit employee compliment was substantially reduced, other staff was reduced, and the actions alleged in the complaint as unfair labor practices during this period were taken. Despite these efforts the operation became uneconomic and, in August 2003, the plant ceased operation and was closed. While there was initial hope the closure would be temporary, circumstances did not change and the facility remained closed.

B. Lebanite Corporation and Oregon Panel Products, LLC

During the deterioration in Lebanite's sales and production described above, Lebanite engaged in the admitted unfair labor practices set forth in paragraphs 8, 9, and 10 of the complaint. Thus, Lebanite improperly refused to provide the Union with requested relevant information in and after April 2003, repudiated the contract on and after July 2003 and closed the facility laying off all its employees in August 2003. During these events, Walker was Lebanite's general manager and, while not a decision maker with respect to Lebanite's actions, was both aware of them and aware of the Union's protests concerning them.

Following the closure of the Lebanite facility and cessation of its operations, when initial attempts to sell the facility proved unavailing, Walker and Donne and a third investor, Terry Butler, determined to acquire the rights to resume operations. They formed Oregon Panel Products, LLC, which on or about October 24, 2003, entered into agreements with Lebanite and its creditors to lease the Lebanite operation. Neither Lebanite nor RES nor its principal, Mark Frater, held any financial interest in OPP. Walker was OPP's general manager. Donne was its general sales manager.

OPP entered into a lease agreement with Lebanite and Frater covering the plant, and all equipment on the premises. The terms of the lease provided for monthly payments to Lebanite and to Lebanite's bank holding notes on the property. An option to purchase lay with OPP. The documents comprise a substantial commercial lease with numerous clauses including indemnity obligations on the part of the tenants and personal guarantees of Frater respecting Lebanite's performance.

OPP took possession of the Lebanite site and in November 2003 commenced hiring and initiated cleanup and inspection. By December 2003 production began and over 2 or 3 month's cleanup and repair took less time and staffing and production was increased. Over time the original employee compliment of about a dozen increased to a maximum of 52.

OPP operated with less manufacturing supervision, had less stratified, more generalized production job functions, and paid lower wages to its employees than Lebanite. The employee complement was roughly an equal portion of former Lebanite employees and employees without such prior experience. Employee applicants and employees were told that OPP was not Lebanite, but rather was an independent entity and was not bound by Lebanites recognition of the Union nor its collective-bargaining agreement. OPP at no time recognized the Union as the representative of its employees.

Despite every effort to lower production costs, attempts to create new products and renewed sales efforts, the difficult economics circumstances described previously got worse and sales were and remained weak. The interim period when the facility was closed—August into October 2003, had sent Lebanite's former customers looking for alternate supply and suppliers and they did not return to OPP in sufficient numbers as had been hoped. In early 2004, material costs increased significantly. In sad summary, the resumption of operations was not viable. In April 2004, OPP determined to abandon its operations and that month the employees were laid off and the plant was shut down.

C. Analysis and Conclusions

1. The relationship between Lebanite and RES

The complaint alleges at paragraph 5 that Lebanite and RES have been at all material times a single-integrated business and/or a single employer within the meaning of the Act. The Board has long examined the following factors to determine if two employing entities constitute a single employer:[5] (1) common ownership, (2) interrelation of operations, (3) common

[5] The fountainhead case approving the doctrine is *Radio Union v. Broadcast Service of Mobile*, 380 U.S. 255 (1965).

management, and (4) centralized control of labor relations. Not all of these criteria must be present to establish single employer status, and a significant factor is the absence of an “arm’s-length relationship found among unintegrated companies.” *Denart Coal Co.*, 315 NLRB 850, 851 (1994). Both counsel for the General Council and for RES recognized the Board’s approach and addressed each of the relevant factors. Counsel for RES emphasized that under *Masland Industries*, 311 NLRB 184, 186 (1993), and *Dow Chemical Co.*, 326 NLRB 288 (1998), the burden of establishing whether two entities constitute a single employer rests with the General Counsel.

There is no dispute that the two entities involved herein, Lebanite and RES, have identical ownership: Lebanite is wholly owned by RES which in turn is 90 percent owned by Mark Frater, the president of each. Merely because Lebanite is a wholly owned subsidiary of RES, that legal relationship does not, of itself, cause the parent and subsidiary to constitute a single employer within the meaning of the Act. *Esmark, Inc. v. NLRB*, 887 F.2d 739 (7th Cir. 1989).

Respecting the interrelationship of operations, save for RES’ use of Lebanite as saw and drill board, there was essentially no interrelationship of operations. There was no record evidence of unit employee transfers, shared production equipment or common suppliers or customers. As described above, RES initially used a substantial amount of Lebanite’s hardboard product, Lebanite, as both saw board and drill board. Over time however that use was very substantially reduced.

Concerning common management, Lebanite and RES had their own hierarchy of supervision. There was, however, a degree of overlap and consultation. Thus, Frater was the president of each entity. Lebanite’s general manager Robert Walker, generally in charge of day-to-day operations, initially reported to Alex Watt, Lebanite’s chief operating officer who maintained offices both at the RES facility in Lodi, California, and at the Lebanon, Oregon facility. His title and authority at RES was not made clear on the record. Later, following Watt’s departure, Walker testified he reported to Frater and regularly held telephonic conferences with RES’ general manager, Jeff Mason.[6] Importantly, Walker also testified that he had no authority to make any decisions respecting financial matters and, as the need arose, made requests of and took instruction from Frater. Frater in turn meets with RES’ general manager to discuss RES’ business matters. I found Walker to be the more convincing witness respecting his limited authority over Lebanite operations as opposed to Frater’s self-description of his more own limited role.[7] Common management may be found where the separate managerial hierarchies take close instruction from a common owner. *Masland Industries*, supra.

Respecting centralized control of labor relations, day-to-day management at Lebanite resided with Walker and local supervision. Clearly, however, the larger policy decisions were taken by Frater. Thus, decisions respecting final approval of contract negotiations, the various decisions taken by Lebanite regarding the actions found to be unfair labor practices, and the various instructions to Walker given in managing the consequences of these decisions were all handled by Frater. While there was little evidence respecting Frater’s control of labor relations with RES, Frater testified that as the president of RES he could and did make decisions respecting labor policy as a matter of right. These facts in their totality support a finding of centralized control over labor relations. “In assessing the appropriateness of single employer treatment, the fact that day to day labor matters are handled at the local level is not controlling.” *Pathology Institute*, 320 NLRB 1050, 1063 (1996).

Considering these factors under the Board guidlines, it is a close question whether the General Counsel has met his burden of establishing that Lebanite and RES together constitute a single employer. It is unnecessary to decide the issue at this point in the analysis, however, because the significant factor of the arm’s-length relationship between the two entities needs still to be considered.

The testimony respecting the price RES paid for Lebanite’s hardboard products was at variance. As set forth above in greater detail, Walker testified that after an initial period, RES paid much less for the products it bought than other suppliers, in effect obtaining the product at or close to Lebanite’s cost. Donne corroborated this testimony. Frater denied that this was so, testifying rather that RES paid in effect what other customers buying like volume of product paid.

The amount billed and received for sales of its commercial product is normally a matter recorded in invoices and other financial documents. The General Counsel subpoenaed Lebanite’s records respecting this question, however the records were allegedly lost in some fashion after the close of Lebanite’s operations and OPP’s initiation of operations—apparently while being shipped from Lebanon, Oregon to Lodi, California. The General Counsel challenges this evidence and seeks an adverse inference against RES and Frater that the records would have corroborated the testimony of Walker respecting the price paid by RES for Lebanite’s product. RES opposes that request. I do not find it necessary to resolve the matter because I find that a similar inference may be drawn against RES for not providing its own records of what it paid for the product. Both commercial sales and commercial purchases are subject to documentation. RES and Frater had the means to document their contentions as to the prices paid for Lebanite product, but did not offer such business records.

Further, even without the adverse inference, I credit Walker, and the corroborating testimony of Clay David Donne,[8] over

[6] Walker was a principal in OPP and therefore arguably aligned in interest with the General Counsel in establishing RES’ joint liability for Lebanite’s remedial obligation which joint liability had the potential to lighten any possible obligation of OPP. Nonetheless, I found him a straightforward and honest witness whose testimony seemed to be given completely from memory without self-censure and without editing. I fully credit all aspect of his testimony.

[7] Frater was less direct and forthcoming in his testimony and was frequently disputative on the stand. I also found his demeanor less convincing than Walker who was an unusually believable witness.

[8] Donne’s testimony was inconsistent with his affidavit as discussed above. None the less, I was impressed with his testimony and demeanor and credit his explanation of the confusion that resulted in the variation between his recollection at trial and the recorded recollection of his affidavit. I credit his testimony respecting Lebanite product pricing to RES.

Frater respecting the prices paid by RES for Lebanite products. It is even possible that Frater did not know the price that was paid by RES. In all events, I find that RES received a very favorable, unreasonably favorable, nonarm's-length price for Lebanite product and this price was far superior not only to the price paid by other customers of Lebanite, but beyond any price based on an arm's-length relationship. In other words, I find the price to constitute significant evidence that RES and Lebanite were not dealing with one another on an arm's-length basis.

This determination is reinforced by the testimony of Frater that RES in effect simply took, without any payment whatsoever, truckloads of blemished Lebanite product for use by RES as saw board. Even if blemished or off specification product did not have the full market worth of unblemished material, and the record does not establish the particulars relevant here, the fact that RES simply took Lebanite output in truckload lots without any compensation whatsoever, is beyond question not an arm's-length transaction.

Given all the above, and based on the record as a whole, the other factors discussed above, and the less-than-arm's-length relationship manifested in the very favorable product pricing of its regular products and the gratis provision of product seconds to RES for use as saw board, I find that the General Counsel has met his burden of proving that Lebanite and RES were a single employer. Two companies which are geographically separate may constitute a single employer where there is other evidence of an interrelationship between them. *Allegheny Graphics*, 320 NLRB 1141, 1143 (1996). I find that to be the case here.

I therefore find that the General Counsel has met his burden of showing that Lebanite and RES are a single employer as alleged in paragraph 4 of the complaint and that RES is therefore jointly and severally liable, with Lebanite, for the unfair labor practices alleged in the complaint, as well as the posting of the notice contained in the motions for summary judgment and for the compliance specification remedy also in the motion and as directed herein.

2. The relationship between Lebanite and OPP

The complaint alleges at paragraph 3 and the General Counsel argues that OPP is a successor employer to Lebanite under the Supreme Court's decision in *Golden State Bottling Co.*, 414 U.S. 168 (1973). The Court in *Golden State* accepted the Board's doctrine that a successor was required to remedy the unfair labor practices of its predecessor of which it was aware at the time of acquisition. The Court made clear that this doctrine of sucessorship is broader than the general rules of corporate law respecting the liability of purchaser for the debts or liabilities of its seller. The Court stated, 414 U.S. at 182 fn. 5:

> The refusal to adopt a mode of analysis requiring the Board to distinguish among mergers, consolidations, and purchases of assets is attributable to the fact that, so long as there is a continuity in the "employing industry," the public policies underlying the doctrine will be served by its broad application. . . .

a. Was OPP aware of Lebanite's unfair labor practices at the time of acquisition?

The General Counsel argues that OPP well knew of the unfair practices of Lebanite at the time of their commission and also knew that the Union had been seeking relief obtaining this knowledge through Walker, Lebanite's general manager and at all relevant times OPP's subsequent principal and agent.[9] Indeed, Walker engaged in conversations both with union officials and with Lebanite's principal, Mark Frater, respecting Lebanite's unfair labor practice conduct and the Union's grievances respecting that conduct—all well before OPP took over Lebanite's operations.

The Government notes that the burden of proving a lack of successor knowledge of the predecessor's unfair labor practices is on the alleged successor and argues OPP has not sustained that burden here. In particular, the General Counsel relies on *S. Bent & Bros.*, 336 NLRB 788 (2001), in which the Board made it clear the successor need be aware only of the unfair labor practice conduct and need not be aware of a particular unfair labor practice Board charge or a Board issued unfair labor practice complaint.

Counsel for OPP argues on brief that while Walker did have initial knowledge of Lebanite's failures to meet its commitments to the unit employees, neither Walker nor OPP were aware of subsequent developments after the closure. Thus, OPP was not aware of the unfair labor practice charges, the Unions postclosure efforts and what, if any actions Lebanite had taken with the agreement of the Union or otherwise to resolve the disputes. Counsel emphasizes Walker's testimony: "As far as I knew, that the trust and Mr. Frater had worked something out."

Having considered the arguments of the parties at the hearing and on brief in conjunction with the record as a whole, I find, in agreement with the General Counsel and the cited *S. Bent & Bros.* decision, supra, that OPP at the time of its acquisition of the Lebanite facility was in fact aware of the conduct of Lebanite that is the basis for the unfair labor practice findings herein.

b. Was there substantial continuity of the employing industry?

"The keystone in determining sucessorship is whether there is substantial continuity of the employing industry." *Miami Industrial Trucks, Inc.,* 221 NLRB 1223, 1224 (1975). Factors which the Board considers in making this assessment include "whether there is substantial continuity in operations, location, work force, working conditions, supervision, machinery, equipment, methods of production, product and services." (Id.)

The General Counsel argues on brief at 16–17 that there was substantial continuity in the employing industry in the Lebanite to OPP transition. Counsel for the General Counsel acknowledges the hiatus in operations from August to November 2003, but notes that OPP principals Walker and Donne were on the premises during that period and maintained contact with cus-

[9] OPP was not named in the October 10, 2003 charge nor was it served with it. It was however named in the November 7, 2003 amended charge which charge was served on OPP on or about that same date.

tomers and negotiated an agreement with Frater respecting OPP's lease of Lebanite's premises and equipment.

Counsel for the General Counsel notes the site location and its general process of manufacturer remained the same for each entity. The facilities plant and equipment was used to manufacture the product without significant purchase of new manufacturing equipment beyond maintenance and repair. The final product, Lebanite, essentially the entire output of both Lebanite and OPP, was unique to the facility and Lebanite, the product name, was a licensed trademarked appellation. While due to deterioration in market conditions customers were not identical, there was substantial overlap.

Addressing commonality of supervision, work force and working conditions, the government argues that continuity does not depend on retention of the original workforce or even a majority of that workforce and that in all events OPP employed a substantial, significant number of Lebanite's former employees. The General Counsel further argues that there is no particular significance to the fact that OPP's wages were about half of Lebanite's unit wages. Respecting supervision the General Counsel argues that two front-line supervisors, Heinback and Passi, had been Lebanite supervisors and that Donne, Walker, and Office Manager Shirley Oxford held the identical positions with OPP they had earlier held with Lebanite.

Counsel for OPP argues on brief that OPP was but a short-term leaseholder which did not acquire the business of Lebanite. As such, it could not have negotiated for indemnity or a hold harmless agreement and therefore should not be held liable for Lebanite's conduct. In making his argument counsel relies on the Board's decision in *Hill Industries*, 320 NLRB 1116 (1996). In that decision, and in *Glebe Electric*, 307 NLRB 883 (1992), the Board focused on the nature of the business relationship between the predecessor and alleged successor. In *Hill*, the alleged *Golden State* successor leased rather than purchased equipment from the predecessor on terms that allowed either party to terminate the arrangement on 30 days' notice. The Board found that under such circumstances the successor had no opportunity to negotiate indemnity or other relief for the successor's conduct. The Board stated at 307 NLRB at 1117:

> And because the agreement allowed either party to terminate the arrangement on a month's notice, neither [the alleged successor] nor [the predecessor] could have known at the time the agreement was reached how long they could expect to benefit from it. In these circumstances, it is difficult if not impossible to know what practical benefit [the alleged successor] received as a result of the agreement. Thus, the record fails to show that, in negotiating over the terms of its equipment-storage-and-use agreement with [the predecessor], [the alleged successor] could have effectively insulated itself from potential exposure to liability for [the predecessor's] unfair labor practices. Nor does it show that [the alleged successor] could have secured indemnification from [the predecessor] as part of this transaction.
>
> Accordingly, we find that the overall nature of the establishment of [the alleged successor] operations was ultimately not of a type under which [the alleged successor] could have effectively negotiated a method of insulation from liability for [the predecessor's] unfair labor practices.

In *Hill,* however, the business of the alleged predecessor and successor were not the same, but were sufficiently different for the judge to find the successor was not a Golden State successor based essentially on that fact alone.

OPP argues that there was no discussion of Lebanite's unfair labor practices or any potential liability for them in the negotiations between Lebanite and OPP respecting OPP resuming operations at the facility. Further, counsel argues that OPP received neither favorable treatment nor a compromise on price in the negotiations based on unfair labor practice conduct or potential liabilities. Neither an indemnity nor a hold harmless clause was incorporated in the final agreement.

I have considered the arguments of the parties in light of the case law and the record as a whole. I find that there is substantial continuity in the employing industry for the following reasons. First and foremost, both Lebanite and OPP operated the same Lebanite, Oregon facility using the same equipment to produce essentially the same product. OPP was clearly leaner and meaner and improvised and reorganized its staff in an attempt to hold down costs, make do with equipment that was not new or it the best of repair, and achieve efficient production with a smaller work force paid much less that Lebanite's bargaining unit.

As counsel for OPP has eloquently argued, the work force was not the same, suppliers and customers were not identical, the principals of OPP were trying new ways to make a go of it knowingly taking up an operation where Lebanite had failed. Yet, it was the same site, the same general manufacturing process and the same manufactured output. Significant proportions of the workforce, the suppliers and the customers were the same. The dearth of customer demand for its hard board product which caused it to cease operations was in many ways the same circumstance that laid Lebanite low.

In reaching this conclusion I have considered and rejected counsel for OPP's argument that it, like the alleged *Golden State* successor in *Hill Industries*, supra, should not be held liable because it could not have negotiated an indemnity or other relief for its predecessor's conduct. I reject this argument because I find that in fact OPP could have negotiated or at least tried to negotiate such an agreement. Thus, I note that the lease negotiated included an indemnification clause binding OPP and a personal guarantee given by Frater insuring compliance with certain provisions by Lebanite. OPP could well have sought indemnification or other provisions respecting Lebanite and its derivative's potential future liability for Leabonite's unfair labor practices. Unlike *Hill*, OPP was in essence taking over Lebanite's entire operation. This was no collateral or minor, small scale, slightly related junction of unrelated business interests. OPP was seeking to take over all of Lebonite which was at the time a closed operation. In such a context OPP had leverage and, if it had sought and failed to obtain satisfactory treatment for the potential unfair labor practice risks OPP would assume in taking over the operation, OPP could have declined to enter into an agreement with Lebonite unless the terms were satisfactory to it.

I am also aware that OPP entered into a lease agreement terminable at short notice by any party. The Court in *Golden State,* however, made it clear, as quoted above, that it approved of the Board's disinclination "to distinguish among mergers, consolidations, and purchases of assets." (414 U.S. at 182 fn. 5.) I therefore do not find the means by which OPP took over the operation to be of major importance. OPP took over the operations by means of an agreement with Lebanite which had options allowing OPP to purchase the property. It could have negotiated indemnities or other protection for unfair labor practice liability as noted. The form of the commercial agreement between the predecessor and the successor here does not defeat or limit the relationship I have found above.

I find therefore that OPP took over Lebanite's operations, preserving substantial continuity in the employing industry at a time when it knew of Lebanite's conduct found to constitute unfair labor practices herein.

c. Balancing the conflicting interests

I have found OPP is a *Golden State* successor to Lebanite. Is it therefore jointly and severally liable, without limit, for the remedy of the unfair labor practices of Lebanite as found herein? The Board in *S. Bent & Bros.*, 336 NLRB 788, 793 (2001), restated the current policy respecting evaluation of the equities of the *Golden State* successor relationship:

> The determination of whether a successor is obligated to remedy its predecessor's unfair labor practices involves a balancing of "the conflicting legitimate interests of the bona fide successor, the public, and the affected employee[s]." [*Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973)] 414 U.S. at 181. The balancing process includes an emphasis on protection for the victimized employee, who may be "without meaningful remedy when title to the employing business operation changes hands." Id. (citing *Perma Vinyl Corp*., 164 NLRB at 969). Guided by these principles, we find that the interests of the public and the victimized employees in this case are best served by requiring Samuel Bent to remedy the unfair labor practices of its predecessor, Bent.[9]
>
> [9] Interests of the public, which must be weighed, include avoidance of labor strife and prevention of a deterrent effect on the exercise of Sec. 7 rights, which may occur if victimized employees find themselves without remedy. 414 U.S. at 184–185.

However, counsel for OPP argues on Brief at 13:

> OPP respectfully submits that even if it is considered a bona fide successor, Golden State and its progeny require that a balance be struck among the legitimate conflicting interests of successors, the affected employees, and the public. Fundamental to this balance is whether a successor who is on notice is in the best position to redress the violations without being unduly burdened. In this case, there is no evidence that OPP was aware of, or bargaining based on, its potential liability. In any event, OPP, having gone out of business, is in no position to remedy any unfair labor practices found against Lebanite and/or RE Service Company, and there is no evidence of any bad faith or impropriety in OPP's decision to cease operations.

OPP makes the point that, whereas the cases describe making a successor liable for the unfair labor practices of the predecessor as a means of providing the employees with a meaningful remedy, this is a balancing determination. Here OPP is itself out of business after only a 6-month attempt to become a viable manufacturer. Arithmetically, the sums due under the compliance specification are roughly a like amount to the total OPP lease agreement payments for the 6 months that OPP operated the Lebanite facility. OPP was not a huge financial conglomerate in its Lebanon, Oregon operation and the dollar amount of the remedy directed herein is not small.

Are the equities here so disproportionate that the obligations of OPP as a successor should be eliminated or reduced on equitable or balancing grounds? Board cases give no guidance in reducing a liquidated remedy of the type involved herein, although counsel for OPP cites United States Circuit Court of Appeals in Board and Department of Labor cases where he argues such balancing occurs. See, e.g., *Steinbach v. Hubbard*, 51 F.3d 843 (9th Cir. 1995); *Coronet Foods, Inc. v. NLRB*, 158 F.3d 782, 795 (4th Cir. 1998). I am not aware of the Board ever in effect reducing the amount of liability by some portion under a balancing process in *Golden State* cases.

Having considered the arguments of the parties, the cited cases and the record as a whole, I find and conclude that OPP, as a bona fide successor to Lebanite with knowledge of its unfair labor practice conduct, should be found jointly and severally liable with Lebanite for the entire remedy directed against it herein. The Board has not suggested that portions of liability or elements of the remedy directed should be apportioned or reductions made. The Board has consistently found an alleged successor to be jointly and severally liable for all the known conduct of the predecessor or not liable at all: No apportioning, all or nothing. On the facts present herein, the balance to be struck among the legitimate conflicting interests of successors, the affected employees, and the public must favor the employees and the public. I therefore sustain complaint paragraph 3 of the complaint and find OPP is liable to remedy the unfair labor practices alleged in the complaint and the liquidated remedy set forth in the compliance specification and below.

REMEDY

The General Counsel's motions for summary judgment and partial summary judgment, granted at the opening of the hearing as described above, provide as the remedy to the unfair labor practices and in remedy of the compliance specification a specific order and notice.[10] The remedy directed herein, including the notice, is that set forth in the granted summary judgment motions adjusted to incorporate Board procedural requirements. Lebanite, RES, and OPP are jointly and severally liable for the remedy directed.

[10] The General Counsel's Motion for Summary Judgment, Exhs. 8(a) and (b) in the record as GC Exh. 2.

CONCLUSIONS OF LAW

On the basis of the above findings of fact and the record as a whole and Section 10(c) of the Act, I make the following conclusions of law.

1. Lebanite Corporation, R. E. Service Company, and Oregon Panel Products, LLC are, and each has been at all times material, employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. At all material times, the Lebanite Corporation and R. E. Service Company, constitute a single employer within the meaning of the Act.

3. On or about October 24, 2003, and at all times thereafter, Oregon Panel Products, LLC has continued to be the employing entity with notice of Lebanite Corporation's potential liability to remedy its unfair labor practices and is a successor to the Lebanite Corporation.

4. The Charging Party is, and has been at all relevant times, a labor organization within the meaning of Section 2(5) of the Act.

5. The Charging Party represents the Lebanite Corporation's employees in the following unit, which is appropriate for bargaining within the meaning of Section 9 of the Act:

> All full, regular part-time and temporary production employees, maintenance employees and transportation employees employed by Lebanite Corporation at its Lebanon, Oregon facility; excluding all professional employees, temporary construction employees, independent contractors and their employees, guards and supervisors as defined in the Act.

6. Lebanite Corporation violated Section 8(a)(5) and (1) of the Act by engaging in the following acts and conduct respecting the unit set forth above:

(a) At all times since April 30, 2003, failing and refusing to provide the Charging Party requested information relevant to its duties as the exclusive representative of unit employees.

(b) Since on or about July 1, 2003, repudiating the contract, which repudiation included its failure and/or refusal to pay (or on behalf of) unit employees the following:

i. vacation pay
ii. 4th of July holiday pay
iii. floating holiday pay
iv. bonus pay
v. wage increase effective July 1, 2003
vi. pension contributions
vii. medical insurance payments

(c) On or about August 1, 2003, ceasing operations and laying off all employees and thereafter leasing its facility on or about October 24, 2003, all without prior notice to the Charging Party and/or affording the Charging Party an opportunity to bargain with respect to the effects of such conduct.

7. The unfair labor practices described above are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

Based upon the above findings of fact and conclusions of law, and on the basis of the entire record herein, and in particular the proposed order in the Motion for Summary Judgment granted at the beginning of trial, as described supra, I issue the following recommended[11]

ORDER

The Lebanite Corporation, R. E. Service Corporation and Oregon Panel Products, LLC, their officers, agents, successors, and assigns, shall, jointly and severally:

1. Cease and desist from

(a) Failing and refusing to furnish the Western Council of Industrial Workers Local 2554 affiliated with United Brotherhood of Carpenters and Joiners of America with the information requested by it, relevant and necessary to their representation of unit employees.

(b) Failing and refusing to notify and offer to bargain with the Union respecting the effects of its closure of its Lebanon, Oregon facility.

(c) Since on or about July 1, 2003, repudiating the contract, which repudiation included its failure and/or refusal to pay (or on behalf of) unit employees the following:

i. vacation pay
ii. 4th of July holiday pay
iii. floating holiday pay
iv. bonus pay
v. wage increase effective July 1, 2003
vi. pension contributions
vii. medical insurance payments

(d) On or about August 1, 2003, ceasing operations and laying off all employees and thereafter leasing its facility on or about October 24, 2003, all without prior notice to the Charging Party and/or affording the Charging Party an opportunity to bargain with respect to the effects of such conduct.

(e) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Pay to the employees named below the amounts set forth next to their names, consistent with the compliance specification, with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987):

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Employee	Back Pay Owed
Anderson, Edwin	$4,031.53
Bergh, James L.	5,674.88
Bottcher, Dennis Mervyn	5,371.27
Breshears, Chuck E.	3474.48
Burbach, David C.	4,053.73
Christensen, Richard L.	7,084.55
Coelho, Lanita Ann	2,505.71
Davis, Duane A.	2,415.22
Doll, Harold J.	294.80
Evans Sr., Michael L.	6,464.40
Fast, Gordon L.	3,816.90
Flanagan, Terry Lee	5,275.26
Fraba, George F.	9,460.36
Grill Byron G.	2,464.73
Grumbo Jr., Frederick N.	5,106.43
Hoover, Kenneth Gene	5,424.05
Hopkins, Howard E.	5,381.77
Horner, Ralph M.	2,922.35
Hubbard, James L.	4202.78
Huston, Kevin A	3,268.30
Johnson, Pillip Morris	3,091.26
Jones, Sammy L.	5,533.25
Lawson, Robin R.	2,710.90
Lindley, Russell A.	2,510.82
Lowman, Julius M.	4,009.81
Lyons, Donald J.	4,639.68
Marshall, Ronnie J.	5,167.69
Mitsch, Richard E.	3,282.43
Neal, Johnnie D.	5,436.42
Nissen Jerry L.	5,736.82
Oeder, Michael Gene	5,620.13
Orr, Earl W.	3,762.94
Peters, Brian E.	3,105.65
Peters Ernest J.	6,974.10
Pettner, Charles A.	4,031.67
Plagmann, Lynn E.	4,039.58
Port, Stanley D.	3,576.24
Ridenour, Rosalie Y.	3,441.34
Robertson, Benny	5,425.20
Rounsavelle, Donald	3,200.68
Ryan, Michael W.	7,294.29
Ryan, Robert E.	5,107.84
Selensky Jr., Steven P.	3,631.83
Stevens, David W.	1083.31
Stoering, Rodney E.	3,504.41
Summers, Larry	4,849.61
Tansley, Ronald C.	4,407.83
Thayer, Matthew E.	4,634.62
Torres, Francisco	1059.04
Tuma, Gary N.	3,172.87
Walls, Terry N.	7,015.60
Ward, Virgil Ray Jr.	5,811.16
Webb, Daniel D.	3,994,16
Zwetzig, Terry A.	1,883.55
TOTAL:	$231,440.27

(b) Provide, to the extent it has not already done so, the information requested by the Union in it letter dated April 30, 2003.

(c) Upon request bargain collectively with the Union with respect to the effects on its unit employees of its decision to close its facility in Lebanon, Oregon, and reduce to writing any agreement reached as a result of such bargaining.

(d) Considering that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall, within 14 days after service by the Region, duplicate and mail, at its own expense an exact copy of the attached notice to the Union and to all of its unit employees employed at its former Lebanon facility during the period from April 10, 2003, through August 31, 2003.[12] Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. Copies of the notice, on forms provided by the Regional Director for Region 19, in English and such other languages as the Regional Director determines are necessary to fully communicate with employees, after being signed by the Respondent's authorized representative, shall be mailed immediately upon receipt thereof.

(e) Preserve and within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all records, including an electronic copy of such records if stored in electronic form, necessary to determine if the terms of this Order have been complied with.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

An employer subject to the National Labor Relations Act must collectively bargain with the labor organization that represents its employees concerning wages, hours, and working conditions. While an employer need not bargain with a union about its determination to cease all operations and go out of business, it must give the union notice of such a decision and an opportu-

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

nity to bargain concerning the effects of such a sale, lease, and/or closure upon employees represented by the labor organization.

WE WILL NOT interfere with your free exercise of any of these rights;

WE WILL NOT fail or refuse to timely furnish Western Council of Industrial Workers Local 2554 affiliated with United Brotherhood of Carpenters of America (the Union) information that is relevant and necessary to its role as the exclusive representative of employees in the unit described below.

WE WILL NOT repudiate the contract with the Union by refusing to abide by its terms, including the failure to properly pay to unit employees, 4th of July holiday pay, floating holiday pay, bonus pay, a wage increase, pension contributions; and/or medical insurance payments.

WE WILL NOT fail and refuse to notify the Union of our decision to cease operations for our business, lay off employees, and lease our Lebanon, Oregon facility to Oregon Panel Products, and WE WILL NOT fail and refuse to provide the Union with an opportunity to bargain respecting the lease and closure of our facility, and the laying off of our employees.

WE WILL NOT in any like or related manner, violate the Act.

WE WILL furnish the Union, in a timely manner, the information it requested by letter of April 30, 2003.

WE WILL upon request, bargain with the Union with respect to the effects on our employees of the decision to cease operations, lay off employees, and lease our Lebanon, Oregon facility to Oregon Panel Products, and reduce to writing any agreement reached as a result of the bargaining

WE WILL pay unit employees named in the Order in this decision, the amount set forth next to their names, with interest.

The Union represents employees in the following unit:

> All full, regular part-time and temporary production employees, maintenance employees and transportation employees employed by Lebanite Corporation at its Lebanon, Oregon facility; excluding all professional employees, temporary construction employees, independent contractors and their employees, guards and supervisors as defined in the Act.

LEBANITE CORPORATION